BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FILED
11-01-06
04:59 PM

Order Instituting Rulemaking to Consider Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006	R.06-10-005

REPLY COMMENTS OF THE UTILITY REFORM NETWORK

November 1, 2006

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Pursuant to the schedule established in the Order Instituting Rulemaking ("OIR"), The Utility Reform Network ("TURN") submits these Reply Comments in the above-captioned proceeding.

I.INTRODUCTION

One of the most disturbing aspects of the instant proceeding is reflected in how the Commission through the OIR and the draft General Order ("G.O.") essentially ignore critical and fundamental elements of the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"). As TURN will discuss in more detail below, the Legislature expressed clear intent, both in the legislative history as well as in specific statutory language, that the Commission was required to prevent discriminatory access, ensure no cross-subsidization of video infrastructure from basic residential telephone rates and hold video franchisees accountable for complying with consumer protection laws and

regulations. In spite of this clear mandate, however, there is very little in the OIR and G.O. to effectuate these statutory responsibilities.

Instead of providing a clear and detailed set of rules and regulations that fulfill the intent of the Legislature, the Commission has embarked on a path that minimizes its role and reflects the belief that the Commission's sole purpose in implementing the legislation is purely ministerial. Not surprisingly, in spite of the obvious zeal of the Commission to play as small a role as possible, the comments of the telephone and cable companies focus on how they believe the Commission has exceeded even those minimal responsibilities articulated in the draft G.O. In contrast, the consumer groups that filed opening comments argue that the enabling legislation did not intend that the Commission simply rubber-stamp the video applications and further argue that the Commission has broader authority to protect the public interest. The comments of the cities reflect somewhat of a middle ground, focusing primarily on protecting the authority of local jurisdictions over various aspects of video franchising and provision of video services. These differences, particularly between the telecommunications interests and consumers can be seen in the positions taken on a number of issues, particularly whether protests of applications, renewals and transfers should be permitted; whether intervenor compensation should be authorized; the specific information and details of the reporting requirements; the authority of the Commission relating to complaints and investigations; and the absence of any enforcement mechanisms relating to the prohibitions on discrimination and cross-subsidization. In our Reply Comments TURN will discuss most of these issues.

The OIR creates the worst of all possible worlds for both video and telephone customers, by sweeping aside the provisions of DIVCA that the legislature put in place to ensure that the general public truly receives the benefit of video competition. It is clear from the legislative history of DIVCA, that the legislature is deeply concerned that all Californians benefit from the deployment of new infrastructure, that video competition is conducted in a manner that treats all customers, including those in low income and minority communities equally, and that subscribers to the least competitive basic telephone service are not forced to pay higher rates to subsidize a telephone company's lucrative video network. Most of these key statutory provisions ignored by the OIR, which seems designed to provide a minimal set of rules intended to facilitate the rubber-stamping of franchises to anyone capable of filling out an application. As the Consumer Federation of California ("CFC") notes, this is insufficient to protect the public.[1] The Commission cannot pay lip service to build-out requirements and anti-discrimination provisions of the law, or to cross-subsidy, yet that is exactly what it does.

As the California Community Technology Policy Group and Latino Issues Forum ("CCTPG/LIF") point out, the Commission's rush to push through the most minimal set of rules it could possibly develop has precluded adequate public participation.[2] This is particularly disturbing given that the legislature strove mightily to craft a law that carefully considered the interests of all stakeholders. Now, the key provisions of the statute that were put in place specifically to protect the public are being shunted aside and the public has very little opportunity to comment upon this, let alone have those views

[1] Comments of the Consumer Federation of California on the OIR to Implement AB 2987, p. 1 ("CFC").
[2] Opening Comments of California Community Technology Policy Group and Latino Issues Forum on the OIR Implementing the Digital Infrastructure and Video Competition Act of 2006, pp. 2-3 ("CCTPG/LIF").

taken into account in the crafting of the rules. CCTPG/LIF's proposal for public participation hearings has significant merit and should be adopted by the Commission.

II. THE OIR AND DRAFT GENERAL ORDER IGNORE CRITICAL AND FUNDAMENTAL ASPECTS OF DIVCA

While the video franchise statute has several ambiguities it is absolutely clear both from the actual statutory language as well as from the legislative history that the Legislature was deeply concerned that consumers not be harmed by the introduction of increased competition in video services. Thus, the statute specifically provides for non-discriminatory access to video services (§ 5890), prohibits providers of video services who also provide stand-alone basic telephone services from increasing the telephone rates to finance the cost of deploying the video service (§ 5940), and requires franchise holders to comply with consumer protection laws and regulations (§ 5810(a)(2)(G)). In spite of these specific provisions, however, the OIR and draft G.O. are, for the most part, amazingly silent on how the Commission intends to enforce these requirements. Interestingly, the telecommunications interests that filed initial comments were also silent on Commission enforcement of these statutory provisions while simultaneously arguing that the Commission must strictly adhere to the specific requirements identified in the legislation. In comparison, however, almost all the representatives of consumers who filed comments, expressed concern that the Commission was failing to fulfill its mandated responsibilities.[3]

[3] See, for example, Opening Comments of California Community Technology Policy Group and Latino Issues Forum on the OIR Implementing the Digital Infrastructure and Video Competition Act of 2006 ("CCTPG/LIF"); Comments of the Consumer Federation of California on the OIR to Implement AB 2987 ("CFC"); Opening Comments of the Division of Ratepayer Advocates ("DRA"); and Comments of the utility Reform Network ("TURN").

Like many of the parties filing opening comments, TURN was an active participant in the legislative process and debates underlying AB 2987. During that process it was made abundantly clear that several of the *quid-pro-quos* for passage of a video franchise bill that, in effect, permitted the incumbent local exchange companies ("ILECs") to bypass local governments and get a state video franchise were the anti-discrimination, no cross-subsidization and consumer protection provisions. Thus, it is remarkable that the OIR and G.O. are so silent on these issues.

Perhaps the lack of specific provisions in the OIR and G.O. for enforcing the non-discrimination, cross-subsidization and consumer protection requirements was merely an oversight due to the Commission's incredible rush to implement a franchise process. If so, then the Commission is sacrificing quality and sufficiency for speed. There is absolutely no reason for the Commission to have its franchising procedures in place by the OIR's artificially accelerated deadline of January 2, 2007, particularly given that the Legislature provided that the Commission "shall commence accepting applications for a state franchise no later than April 1, 2007."[4] In its haste to accelerate the process, the Commission has glossed over significant and critical aspects of the legislation.

Whatever, the reason, the OIR and GO must be amended to comport with the specific statutory responsibilities placed upon the Commission. In that regard, TURN supports the G.O. revisions proposed by the Division of Ratepayer Advocates ("DRA") relating to the prevention of cross-subsidization[5] along with the recommendations in TURN's opening comments.

[4] Cal. Pub. Util. Code § 5840(g)..
[5] DRA, p. 3 and Attachment B, pp. 34-35.

Not only is the Commission silent on these important elements of its statutory responsibilities, the denial of an opportunity for parties to file protests of applications, renewals and transfers eliminate a significant aspect of the Commission's enforcement of the legislation. As several parties have pointed out, the franchise application process is intended to be more than a mere rubber-stamp by the Commission. For example, as the California Community Technology Policy Group/Latino Issues Forum ("CCTPG/LIF") and the Consumer Federation of California ("CFC") discuss, the application process should require applicants to present how they intend to meet the statute's build-out and anti-discrimination requirements.[6] The application process should provide an opportunity for the Commission as well as interested parties to assess whether an applicant is fit and meets the requirements established by the statute including the specific concerns clearly identified by the Legislature.

A robust protest process combined with specific details relating to the critical elements now absent for the OIR and G.O. has a far better prospect of fulfilling the promise of DICVA than what the Commission has proposed.

III. TO INTERPRET DIVCA AS CONFERRING PURELY MINISTERIAL AUTHORITY TO THE COMMISSION MISCONSTRUES THE LEGISLATIVE INTENT

Several parties, principally the ILECS and the cable interests, contend that the authority vested in the Commission by the video franchise statute is purely ministerial.[7] They argue that the authority of the Commission is limited and specifically enumerated

6 CCTPG/LIF, p. 3; CFC, pp. 4-5.

7 See, for example, Opening Comments of Verizon California Inc. on proposed General Order, p. 7 ("Verizon"); Comments of the California Cable and Telecommunications Association, p. 1 ("CCTA"); Opening Comments of SureWest Televideo ("SureWest"); and Opening Comments of AT&T California ("AT&T").

and go to great lengths to quote specific language from the statute to support their argument. To a certain degree, these parties are correct. The legislation does prohibit the Commission from regulating video services as a public utility. Thus, for example, there will be no rate cases or rate regulation and no proceedings where the franchisees must seek permission to use property in a particular manner.

That said, however, the legislation does not provide a completely *laissez faire* approach. As discussed above, the Commission is not only given specific authority to grant or deny state video franchises, but DIVCA also confers authority upon the Commission to prohibit discrimination and prevent cross-subsidization and to ensure adequate consumer protection. Clearly, the Legislature was concerned enough about these issues to include specific language and requisite authority for Commission enforcement. Any other reading of the statute would nullify the legislative intent.

The SureWest comments include an elucidation of the "rules" of statutory construction and interpretation.[8] These "rules" generally provide that the clear meaning of a statute must be given preference and that an administrative agency cannot provide interpretation outside that meaning unless there is ambiguity. An obvious corollary is that an administrative agency should not interpret a statute to effectuate an outcome that is absurd given the statutory language and legislative intent. Applying these "rules" however does not result, as argued by the telecommunications companies, that the Commission is fundamentally limited in implementing the video statute. The following discussion identifies some of the more egregious areas where TURN submits that parties incorrectly interpret DIVCA.

[8] SureWest, p. 2.

A. *Complaints And Investigations*

AT&T and the California Cable and Telecommunications Association ("CCTA") argue that the "Commission's authority to open an investigation is limited to claims of discrimination or denial of access, as specified in section 5890".[9] These parties are correct that the specific language relating to the Commission opening an investigation on its own motion resides in § 5890. However, to then extrapolate that the Legislature intended that the Commission's investigative powers be limited to only the issues relating to possible discrimination undermines the legislative intent. For example, § 5900(k) provides that the DRA "shall have authority to advocate on behalf of video customers regarding renewal of a state issued franchise *and* enforcement of Sections 5890, 5900, and 5950" (emphasis added). It is illogical to assume, as does AT&T and CCTA, that the Legislature would authorize the DRA to "advocate on behalf of video customers" issues not only pertaining to discrimination (§ 5890), but also issues relating to customer service (§ 5900) and telephone rate increases (§ 5950), if the Commission was not also granted the ability to act on DRA's advocacy, for example by opening an investigation. Similarly, it is absurd to assume that the Legislature specifically prohibited cross-subsidization of video investment by rates paid for basic telephone service (§ 5940) without granting the Commission the authority to investigate whether this prohibited conduct is occurring. Finally, the statue clearly states the principle to "maintain all existing authority of the California Public Utilities Commission as established in state and federal statutes."[10] To limit the Commission inherent investigatory powers would directly contravene this principal.

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[9] AT&T, p. 10. See also, CCTA, p. 9.
[10] Cal. Pub. Util. Code § 5810(a)(2)(G).

B. Reporting Requirements

Several parties express concern that the Commission is exceeding its authority by establishing reporting requirements that these parties allege are beyond the purview of the statute. For example, AT&T objects to "expanded reporting requirements" in the application process.[11] AT&T also objects to the requirements to report on broadband penetration,[12] community center data[13] and the Commission's ability to request additional information if a "legitimate need arises."[14] In a similar vein, Verizon asserts that the Commission's definition of "socioeconomic information" that must be reported is too broad[15] and that the broadband information that must be reported is equally overbroad.

Contrary to the assertions of AT&T and Verizon, the information detailed in the G.O. is precisely the kind of information discussed in the statute. The identified information is necessary for the Commission to engage in a reasoned assessment of a franchise applicant's credentials and ability and commitment to fulfill the requirements of DIVCA. In addition, the information required for reporting purposes including any additional information the Commission deems "legitimate" is precisely the data necessary for the Commission to fulfill its statutory responsibilities. Anything less makes a mockery of the authority delegated to the Commission by the Legislature.

C. Protests

11 AT&T, pp. 3-5.
12 AT&T, p. 8.
13 AT&T, p. 9.
14 AT&T, p. 9.
15 Verizon, p. 9.

As discussed above, the Commission has proposed in the OIR and G.O. to prohibit protests of franchise applications. Neither the Commission, nor the parties advocating this position have pointed to any language in the franchise legislation for support. Instead, weak arguments have been proffered such as the "44-calendar-day timeframe set forth in the Act for review and issuance of a franchise do not lend themselves to the opportunity for protest as that term is generally understood in Commission practice"[16]. The OIR supports the denial of an opportunity to protest because the legislation does not provide for it.[17] Others argue that since the franchise process is merely "ministerial" and that the "application criteria are very detailed and capable of objective determination", then no protests are required.[18]

In comparison, the majority of parties filing opening comments urge the Commission to permit protests of franchise applications, as well as of renewals and transfers. All the consumer groups as well as the cities filing comments made compelling arguments to support the opportunity to file protests. The cities convincingly point to the expertise that local governments have had with video franchising and the responsibilities municipalities continue to have to protect their citizens under the franchise bill.[19] The CCTPG/LIF and CFC point to the numerous application criteria that must be reviewed by the Commission and that are clearly areas that "are properly under Commission jurisdiction and are properly the focus of a protest filed by an interested party."[20] Finally,

16 Verizon, p. 7. See TURN's Opening Comments, p. 5 where we discuss how a protest process can be accomplished within the 44-day period.
17 Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006, p. 11 ("OIR") (footnotes omitted).
18 Verizon, p. 7.
19 See, for example, Initial Comments of City of Berkeley, pp. 2-4 ("Berkeley") (as well as the comments of the cities of Redondo Beach, Long Beach, Arcadia, Walnut Creek, and Pasadena), and Joint Opening Comments of the League of California Cities and the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors, pp. 8-11 ("League").
20 CCTPG/LIF, p. 5.

the CFC points out that AB 2987 clearly states that the public interest is best served when the Commission can "thoroughly examine the issues before it, and …can take timely and well-considered action on matters before it" and when "full compliance" with the requirements of the statute is ensured.[21] It is only through an open process that permits the participation of all interested parties can the Commission truly examine all the issues and make fair decisions that comport with DIVCA as well as the Commissions' responsibilities under the Public Utilities Code.

IV.INTERVENOR COMPENSATION SHOULD BE PERMITTED

Those parties that oppose permitting intervenor compensation for participation in proceedings relating to DIVCA rely primarily on the language in Sections 1801, et seq. of the Public Utility Code, which provide for intervenor compensation in proceedings involving public utilities. Thus, these parties assert, since DICVA specifically declares that video franchise holders are not public utilities, then no intervenor compensation can be awarded.[22] TURN contends that this is an extremely narrow interpretation of the intervenor compensation statute and a dogmatic view of DIVCA.

As TURN discussed in our opening comments, the intervenor compensation provisions express a legislative intent to encourage broad participation in Commission proceedings. Although the procedures relating to video services have been declared to not be public utility regulation, all the activities necessary for the Commission to carry out its DIVCA responsibilities appear to be extremely similar to the actions the Commission has undertaken when dealing with traditional public utilities. And, in fact, § 401 and §

21 CFC, p. 8.
22 See Verizon, p. 3; SureWest, p. 17; CCTA, p. 12.

5810(3) of DIVCA specifically provide that the Commission should treat its new video franchising responsibilities in the same manner as the Commission treats its other regulatory duties including the collection of sufficient fees to enable the Commission to meet its mandates. To permit the Commission to utilize its processes and procedures in a manner that looks exactly like public utility regulation, but then prohibit intervenor compensation because the companies subject to those processes and procedures are not called "public utilities" would be totally at odds with the intent of the intervenor compensation statute. Applications for operating authority, protests if permitted, complaints, investigations and enforcement actions – all authorized by DIVCA – are classic elements of the Commission's role no matter whether called "public utility regulation" or not. If the Commission is going to have a meaningful process, then public participation is necessary and intervenors should be able to claim appropriate compensation.

V.CONCLUSION

DIVCA represents a significant opportunity for California consumers. However for that opportunity to reach fruition the Commission must implement the legislation in a fair and open manner and by fulfilling all the responsibilities delegated to it by the Legislature. The mandate of DIVCA is not, as reflected in the OIR and G.O., that the Commission have as small a role as possible in video services. Rather, DIVCA represents a balanced view that attempts to introduce new competition while at the same time protecting all California consumers. To do any less would represent a failure of the Legislature and a failure for the Commission.

November 1, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Cory Oberdorfer, certify under penalty of perjury under the laws of the State of California that the following is true and correct:

I served the attached:

COMMENTS OF THE UTILITY REFORM NETWORK

by sending said document by electronic mail to each of the parties on the two Service Lists of **R.06-10-005**.

Executed this November 1, 2006 in San Francisco, California.

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